

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

75-4145

To be argued by
KRISTIN BOOTH GLEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4145

WNCN LISTENERS' GUILD,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

STARR WQIV, INC.,

Intervenor.

ON A PETITION FOR REVIEW FROM A DETERMINATION OF
FEDERAL COMMUNICATIONS COMMISSION

PETITIONER'S REPLY BRIEF

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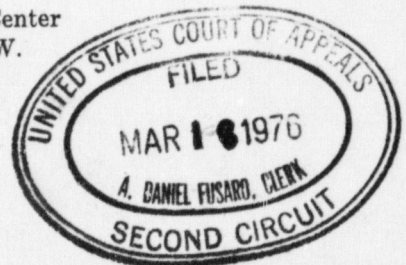


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Introductory Statement

In its original brief,¹ Petitioner WNCN Listeners' Guild (hereinafter "the Guild") argued at length a number of issues which will not be repeated here.²

While the answering brief filed by the Respondent Federal Communications Commission³ (hereinafter "the Commission")

¹ Hereinafter cited "Guild Br." followed by the appropriate page number.

² The failure to repeat this argument should in no way be construed as abandonment of them. This is particularly true of the First Amendment affirmative requirement argument contained in the Guild's brief at pp. 55 et seq. and nowhere answered by the Commission.

³ Hereinafter cited "Comm'n Br." followed by the appropriate page number.

raised no issues which were not dealt with in the Guild brief, it did serve to underscore certain of the Commission's approaches to crucial issues which the Guild believes led directly to the erroneous result below.

The Commission refused ever to determine whether there was an controversial issue of public importance, or even to define the issue, controversial or not; the Commission premised this rather startling omission entirely upon its "deference" to the licensee's determination that it did not air one side of an undetermined, undefined issue.

Or, to put it another way, without making any independent evaluation of what the issue was and whether it involved public controversy, the Commission accepted both Starr's framing of the "issue" and its statement that it had not presented one side.

This was neither "reasonable," nor in keeping with the Commission's own standards, nor premised on substantial evidence. In fact, examined objectively, the material broadcast by Starr clearly constituted one side of a raging public controversy as to how the WNCN format might be saved - a controversy recognized and described by numerous contemporaneous commentators whose more objective views were before the Commission, but ignored by it.

The content of the editorial announcements broadcast by Starr similarly poses the controversial issue of public importance which the Guild, from the onset of this litigation,

sought time to respond to. Again, however, by a completely distorted definition of the "issue" the dispositive content of the announcements was ignored. The issues of definition and undue deference are treated in Point I.

Once the issue is accurately stated, the conclusion is inescapable that Starr had a Fairness obligation, with or without the stricter standard imposed on licensees with financial self-interest in the controversy. The Guild's position as to the stricter standard, and the Commission's erroneous non-application of it are discussed at Point II.

In Point III the Guild deals with the contention that there are now "no meaningful remedies" for the fairness violations complained of by demonstrating the appropriateness of the monetary remedies it has repeatedly requested. The Commission's position on this issue would also effectively erradicate the fairness doctrine in change of format cases as, by its theory, the licensee could always prevent an effective remedy by his own wrongdoing. Such a result is not only inconsistent with the Fairness Doctrine but with the D. C. Circuit's "suggestion" to the Commission to determine particular⁴ licensee affirmative obligations and remedies in format cases.

Finally, in Point IV, the Guild argues that material not contained in the Commission's decision or considered by it in reaching that decision may not now be offered to support the post hoc rationalizations of counsel in their attempt to buttress a factually, rationally and legally unsupportable decision.

⁴In Citizens Committee to Save WEFM v. FCC 506 F.2d 246, 258 f.n. 14 (D.C. Cir. 1974) (en banc) See Guild Br. p. 60.

POINT I

THE COMMISSION HAS CONSISTENTLY MIS-
DEFINED THE "CONTROVERSIAL ISSUE OF
PUBLIC IMPORTANCE" AND MISAPPLIED ITS
OWN TESTS FOR DETERMINING THAT ISSUE

A. Incorrect Definition of the Issue

The Commission's brief crystallizes the question which it should have asked, but didn't, and which this Court must, preliminary to all other determinations, decide. That question, whose initial determination is crucial to all other issues in the case is simply,

What was the controversial issue of public importance to which Starr allegedly addressed itself, and to which the Guild wished to reply?

The Commission's answer to this question is no more and no less than Starr's answer, i.e, the "merits" of "the format change."⁵

This answer is both overly simplistic and entirely belied by the history of the controversy as shown in the record before the Commission and this Court.

⁵Significantly, the Commission's argument begins with a synopsis of Starr's contentions,

"In its pleadings Starr contended that the 'Save WNCN' announcements merely took note of the impending format change and did not argue the merits of that charge" (Comm'n Br. p. 12).

The issue is defined as "the format change" again and again throughout the argument, see, e.g., Comm'n Br. at pp. 12, 15, 19. No stricter analysis is ever performed than this recapitulation of Starr's rather self-serving characterization.

The controversial issue of public importance was, in fact, a dual question; stripped to its barest essentials, it asked,

- (a) Must the unique WNCN classical music format be preserved or retained? and
- (b) How shall the unique WNCN classical music format be preserved?

The two parts of the question, the "arguments of partisans" and the "positions of the parties" on them, are, of course, almost inextricably entwined. But they are also separate questions, raised as such by Starr, and the Commission has committed fundamental error by its failure to consider both.

1. Commission Deference to the Licensee's Determination

The Commission's excessive deference to the licensee permitted Starr to narrowly define as the only⁶ question one which, in fact, it never overtly answered. The Commission then found Starr's determination of whether it aired one side of an issue of public importance "reasonable" and attempted to insulate that determination from scrutiny by this Court by raising the barrier of non-censorship and licensee discretion.

But while it may be within the licensee's discretion to decide what to broadcast in the first instance, or how to present

⁶ Obviously, Starr's actual termination of the unique format -- its replacement with rock music -- spoke louder than words in expressing its answer to question (a). It is for this reason, as we have argued, Guild Br. Point IV, that the so-called "format cases" should place a special responsibility on the licensee. For he need not use words in the traditional fashion to show his position -- he need only "pull the plug."

both sides of the issue, it is not within the licensee's discretion to determine ex post facto, what he raised -- it is in this crucial area that the Fairness Doctrine and the First Amendment require the Commission, not the licensee, to make the determination.⁷ This the Commission did not do.

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This distinction in the degree of deference to be paid to the licensee's judgment as to "whether a broadcast discussed a controversial issue" is well analyzed by the opinions of Judges Tamm and Bazelon in NBC v. FCC, 516 F.2d 1101 at pp. 1196 and 1172-74 (D. Cir. 1974) cert. den. sub. nom. Accuracy in Media v. N.B.C. 44 U.S.L.W. 3463 (Feb. 24, 1976) That case, known as the "Pensions" case, has a long and bizarre procedural history. The D. C. Circuit originally overturned a Commission finding of fairness doctrine violation, Pensions, id. at 1101, with a concurring opinion (Fahy) id. at p. 1152, a "supplemental concurring statement" by the author of the majority opinion (Leventhal) id., and a dissent (Tamm) id. at p. 1153. The case was then granted en banc consideration, Order p. 1155. The en banc order was subsequently vacated, the original order reinstated, and the issue of mootness presented to the original panel, Order, p. 1156, Chief Judge Bazelon dissenting, p. 1156, et seq. The Court subsequently vacated its original decision and remanded to the Commission to vacate its original order and dismiss the original complaint. Order, p. 1180 (Per Curiam) Fahy filing "an opinion in support of the order" p. 1180, et seq., Tamm filing a separate "opinion in support of the order" pp. 1184, et seq. and Leventhal filing a "partial concurrence and partial dissent" pp. 1201, et seq. Obviously none of these myraid opinions has any precedential value. Yet they involve the most extensive analyses of the fairness doctrine in a concrete situation which have so far been made. The issue in Pensions was at the opposite end of the fairness doctrine spectrum from that in the instant case -- i.e., it concerned investigative journalism rather than economic licensee self interest -- and we regard the disposition as unpersuasive in this case. We shall, however, cite portions of various of the opinions, understanding that this is done solely for their analyses, even as law review articles and other commentators are cited.

The issue which in fact was raised, and to which the Guild wished to reply can be clearly understood by looking to the concrete factual situation which prompted the original fairness complaint, the content of Starr's editorials, and the understanding of contemporaneous commentators. The Commission erroneously ignored all of these in its attempt to uphold the licensee's determination. We shall, however, consider each briefly and seratim.

2. Factual History and Content of Starr's Announcements.

Shortly after announcing in the press⁸ that WNCN would be changing format, Starr began airing editorials by its chairman and others on how the format could be saved. It was these editorials setting forth the so-called "Buckley plan" to transfer the format to another frequency, not the press announcement of format change, which called forth the Guild's fairness doctrine complaint. It was also solely these "editorials" which the Commission considered in making its decision on the Fairness Doctrine.⁹

From the very beginning, the Guild clearly indicated that it was Starr's editorialized position

"...that the only way to retain the unique programming which WNCN has previously employed is through the means of a listener-sponsored station...."

⁸

Starr, doubtless acting on excellent legal advice, never made this announcement on the station itself, obviously seeking to forestall any fairness claims by possible but as yet unknown opponents of the plan.

⁹

Other material, including the Guild's attempt to purchase time for a program, alleged news announcements on the eve of the format change, and a short-lived Guild tape came into the picture-- and expanded the issues -- much later. But the Commission did not anywhere deal with this in its two opinions, and this Court, which must review the Commission's decision, should not consider the material on this issue either. See Point IV., *infra*.

to which it wished to provide "contrasting views." Glen letter, Sept. 12, 1974 (A5).

The letter also referred to "the future of WNCN" and

"the future of classical music on the present broadcast band."

The former of these two may be seen as an expression of issue (a); the latter as a hybrid of issues (a) and (b). But there can be no question that from the earliest possible pleading, it was not only the unstated "right to change format" but more specifically the Buckley plan on "saving WNCN" to which the Guild wished to speak.¹⁰

The Commission considered the fairness doctrine complaint, rendered its decision and now argues as if only question (a) had ever been asked. How it can do this, in light of the content of each and every one of the WNCN editorials it appends,¹¹ as well as the "ad libs" supplied by the

¹⁰ This has been the Guild's position throughout the entire controversy with Starr. See, e.g. f.n.27 infra at p.20

¹¹ It would be unduly repetitive to quote here from all the announcements broadcast, as we have already done this at length, see, e.g., Guild Br. at pp. 8-12. We note, however, that the very first editorial appended to the Commission's brief contains this familiar refrain:

"We would appreciate any and all pledges to help make WNCN a continuing force in New York music, to maintain it as a full-time classical music station and that can only be done if it becomes a listener-supported, noncommercial station because this frequency is being taken October 5th by another format, a different kind of music.

"If there is enough [pledged monetary] support to justify, the station will continue. If not, it won't; it's as simple as that, as of October 5th...."
(Emphasis added) Comm'n Br. Addendum 1A.

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Guild, is difficult to understand.

3. Arguments of Partisans and Commentators' Views.

Even to the extent that it relies on its strained and inapposite "test" of the "partisan arguments on either side" to define the issue, see pp.13-14 *infra*, the Commission's definition is clearly wrong.

For the public debate at the time the fairness complaint was made and ruled upon was, to put it as baldly as possible, whether the Buckley plan was a fraud, whether it would actually save the format, or whether intervention by the Commission, as urged by the Guild, was the only viable means of saving the format.

The Judges in the original Pensions opinion suggested that one way of locating and defining the elusive "issue" in a Fairness case was to consider the way in which other, contemporaneous, media commentators saw the lines drawn

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The Commission again, as we have previously argued, Guild Br. p. 53 f.n. 80 misinterprets the significance of the additional transcripts submitted by the Guild. (Comm'n Br. p. 17 f.n. 19) The point of this admittedly incomplete monitoring is to demonstrate what WNCN's listening audience actually heard, and accordingly, what controversial issue of public importance was actually aired over WNCN.

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The judges looked at newspaper and magazine reviews of the program at issue to determine how the reviewers had characterized the issue. In fact, a synopsis of these reviews was included as an appendix to the court's opinion, along with the program transcript.

and such an approach, along with paramount consideration of the editorials' content, is equally appropriate here.

These "sides" of the argument over question (b) were clearly recognized and juxtaposed by virtually all commentators on the controversy. The information submitted by the Guild as to these contemporaneous views should have convinced the Commission that the issue was not as Starr had over-strictly and disingenuously characterized it.

For example, the New York Times' first editorial on the subject, written before the Guild was formed and action at the Commission begun, supported the Buckley "Save WNCN" plan. 14

Its second editorial, however, was written in the midst of the controversy about how the format should be saved. In a very different vein it stated

"At this point it is clear that [Starr has] no interest in listener pledges of financial support to save the station. If WNCN is to be kept on the air as a classical music station, only the FCC has the regulatory power to insist that the promise given at the time of the license transfer be matched by performance."
New York Times editorial, Sept. 28, 1974. A97.

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That editorial stated, in pertinent part

When Carnegie Hall was in danger of being torn down, a group of public-spirited citizens banded together to save the old hall, which today continues to enrich the city's musical life. Now an appeal is being made by the WNCN's staff for pledges or funds to establish a non-commercial classical music station. A strong response directly addressed to the embattled station may yet keep alive a source of civilized pleasure for many New Yorkers in search of fine classical music. N.Y.T., Tuesday, September 3, 1974

This editorial, which was Exhibit C6 to the Guild's original Petition was inadvertently omitted from the Appendix and is reproduced in the Addendum to this Brief at AA 1. Subsequent references to material also inadvertently omitted from the Appendix in the Addendum will also be cited AA .

And a third editorial similarly juxtaposed the editorial promises of the Buckley plan with the Guild's plan for litigation.

"The time is past for listener pledges and station promises. It isn't programming, censorship or dictation when a Federal regulatory agency does what it is charged to do by Congress -- regulate." New York Times, Nov. 9, 1974 - A184.

The September 30 issue of Newsweek noted,

The campaign for listener support, some contend, was a charade to divert WNCN's ire following from what Starr officials feared most -- an organized citizens protest to the FCC.... At least two WNCN listeners' groups have begun to petition the FCC to investigate the whole affair." A98

News stories similarly juxtaposed the two positions as in the Times October 2 story where the Buckley plan and its implementation were contrasted with the Guild's legal and citizen protest. A382. See also, e.g., New York Times Sept. 6, 1974, A377, Newsday, Nov. 8, 1974 A187, New York Post, Sept. 25, 1974 and contrast N.Y. Sunday News Sept. 1, 1974, Guild Pet. Exh. C4, AA2 with N.Y. Sunday News, Sept. 15, 1974 Guild Pet. Exh. C18, AA3.

Like the New York Times, the Village Voice made an abrupt turn-around in the controversy, initially supporting a listener pledge campaign, Village Voice, September 3, 1974 (Guild Pet. Exh. C22, AA4) but two weeks later claiming to have been "duped" by the plan, arguing that it "all really was no solution" and stating:

"The solution seems to lie in litigation. The WNCN Listeners Guild has been set up

to petition the FCC for a stay, and ultimate prohibition of the WNCN format change. There are precedents for such action, and even precedents for a good outcome of such a petition. The emotions surrounding the whole WNCN question make it hard to decide where the best avenue of attack lies. But it seems clear that William F. Buckley is going to have a rough time of it in this town for a long while." Village Voice Sept. 19, 1974 Guild Pet. Ex C22, AA5.

The Long Island Press featured an article entitled "How to Really 'Save' WNCN' which began

"The public is being taken for a ride - and one that will probably end with no 24-hour good music station in the metropolitan area unless it takes the proper steps - and takes them today.

A 'Save WNCN' campaign has been launched by Starr board chairman William F. Buckley, Jr. that is a masterpiece of side-stepping the issues. By urging contributions to provide a 24-hour hour a day classical music format free of commercial announcements, the public has been led away from using its time and energies on the only front where the battle can be won-with the FCC in Washington." Long Island Press, Sept. 10, 1974, Guild Pet. Ex C14, AA6.

Perhaps the paradigmatic juxtaposition of the positions of both sides was reflected in an exchange of articles in New York Magazine commencing with Alan Rich's September 25 piece called "Mr. Buckley Passes the Buck". Guild Pet. Ex. C21, AA7 et seq., and followed by the reply of none other than Starr's board chairman, "Buckley (Politely) Returns the Hand Grenade"¹⁵ New York Mag. October 7, 1974. (A119 et seq.)

¹⁵These two articles provide not only amusing but informative reading on the issue of the "major arguments of partisans on both sides" and we commend them to the court.

B. Commission Misapplication of Its "Implicit Issue" Test

In both its opinion and its brief, the Commission justifies the characterization of the issue by Starr, and its deference thereto on what Judge Bazelon has called the "implicit issue" test. Pensions, supra at p. 1168.

While the Guild quoted and relied on the "implicit issue" language of the 1974 Fairness Report in its brief and prior pleadings,¹⁶ the Commission accuses it of having omitted the real test in the paragraphs following that quote. Comm'n Br. p. 13.

Those paragraphs contain the language which the Commission has rigidly applied¹⁷ in upholding Starr's characterization of the issue. As the Commission quotes,

If... the arguments and views expressed over the air closely parallel the major arguments advanced by partisans on one side or the other of the public debate it might be reasonable to conclude that there had been a presentation on one side of the ultimate issue....
48 FCC 2d at 13 (emphasis added). Comm'n Br. p. 13

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As the Guild quoted, at p. 29 of its brief.

[A] broadcast may avoid explicit mention of the ultimate matter in controversy and focus instead on assertions or arguments which support one side or the other on that ultimate issue.

17 The major contention in the Commission's brief as to why Starr's classification of the "issue" was reasonable is that the arguments on both sides of the format issue were about economic viability and the like; as Starr did not air any of these, it must not have broadcast one side of a controversial issue of public importance. This, however, is neither "reasonable" nor factually correct, see pp. 9-12 supra.

The Commission, however, is guilty of the very sin of omission it accuses the Guild of. The omitted words are, most significantly,

"for example"

The "parallel arguments" example is simply that; it is not the only way of determining the implicit issue raised in a broadcast. What the Commission has done, both in its opinion and its brief, is to elevate a single possible example (of which, obviously, there will be many) to dogma.¹⁸

We do not believe this is nit-picking; rather we believe it goes to the very heart of the erroneously rigid fashion in which the Commission has viewed this case from the start. By taking so artificially narrow a view of the "implicit" issue test, and ignoring the explicit issue demonstrated in the editorials themselves, the Commission has acted in conflict with its own stated Fairness Doctrine standards and certainly with the principles which underlie the Fairness Doctrine itself.

¹⁸ As we have already argued, Guild Br. p. 38 fn. 54 and p. 39 the Commission mistook the legal arguments advanced in the litigation before it for the sides in the partisan controversy. This, we presume, is what is meant in its brief at p. 11, where it claims to have

"reviewed material showing the major issues dealt with both both sides."

This is a serious mistake as consideration of the actual sides, perceived by the media and Starr's side, seen in its editorials, has shown. This mistake is analagous to saying that the major arguments in the controversy around the N.Y. Times publication of the Pentagon Papers were technical questions on the history of prior restraint litigation, as argued in the Courts, rather than whether the American people had a right to know the truth about the Viet Nam war.

The technical arguments of lawyers are only that; the fairness doctrine was not developed to protect their sensibilities but to deal with major controversial issues as they are perceived by the public who hears them.

POINT II

THE COMMISSION SHOULD HAVE APPLIED
A STRICTER STANDARD BECAUSE OF THE
LICENSEE'S FINANCIAL SELF-INTEREST

We have already argued at length that Starr's financial self-interest in the controversy required the Commission to apply a "stricter standard" in reviewing the "reasonableness" of Starr's determination that it was not airing one side of a controversial issue of public importance. Guild Br. pp. 44-48 and we do not wish to repeat those arguments here.

We wish only to comment briefly on three statements made in the Commission's brief in support of its argument that no stricter standard is required.

First, the Commission, distinguishing the cases cited by the Guild, states that it will only apply the stricter standard once a licensee himself has determined that he has broadcast one side of a controversial issue of public importance. This "distinction" is typical of the Commission's total abdication of Fairness Doctrine responsibility.

If a licensee with a financial interest cannot be trusted with ordinary standards of discretion to decide how to balance his one-sided presentation, how can he be given unbridled discretion to define the issue in the first place? Obviously, if self-interest is going to be employed to avoid fairness doctrine responsibilities, there is no better way to

do so than to "define" as the issue one which the licensee has not addressed himself. This makes it easy for the licensee, and easy for the Commission, but it renders enforcement of the Fairness Doctrine a complete mockery. This, unfortunately, is what happened here; unless corrected by this Court, it will provide the perfect way for financially interested broadcasters to avoid their "special responsibilities" under the Fairness Doctrine, with or without a stricter standard.

Second, in the same vein, the Commission's brief states,

"The Commission has adequate means to deal with licensees who use their facilities for private financial gain while ignoring the public interest and who in other ways abuse their public trust."

While the Commission may have adequate means, it does not, for reasons we have already discussed,¹⁹ generally use them.

See, e.g., Chronicle Broadcasting Co., 40 FCC 2d 775, 883-836 (dissenting opinion of Nicholas Johnson) (1973).²⁰ Nor should the existence of these "other means" be permitted to obviate the Commission's responsibility to enforce the fairness doctrine and to fashion appropriate remedies for its violation, as here.

¹⁹See, e.g., Guild Brief at p. 41, fn. 59, p. 42, fn. 61.

²⁰An issue there was whether the licensee had used his broadcast facilities to "manage" or slant news and public affairs for the purpose of advancing his publishing interests. The Commission found many such individual incidents, and a general "undesirable climate" but refused to do anything about it. Commissioner Johnson cited the case as a flagrant example, "reveal[ing] the extent to which this Commission will go to free [the licensee] from the implications of its own conduct" *id.*, p. 836. The case was appealed but settled prior to an opinion on the merits.

Finally, in reasserting its total reliance on licensee "discretion," the Commission tellingly states,

"...that licensee reasonableness and good faith are not quantitative standards, susceptible to measurement or classification" Comm'n Br. p. 18.

The failure or refusal to measure or classify, or indeed to make any determination of reasonableness, means no less than that there cannot be a fairness doctrine. This was not the intent of either Congress or the Supreme Court, and we cannot believe this court will permit such a result.

POINT III

MEANINGFUL RELIEF MAY STILL BE GRANTED IN THIS CASE

The Commission has charged that

"The Guild has not shown that meaningful relief concerning its fairness complaint still may be granted in this case" Comm'n. Br. p. 21.

and apparently premises this conclusion upon a statement made in a prior Guild pleading, and the August 19, 1975 five-party agreement of which the Guild is a signatory. The Commission's reliance on both these grounds is misplaced.

First, although the Guild originally stated in its stay application to the D.C. Circuit that,

"[w]ith regard to the Fairness Doctrine Complaint --- a change of format prior to a balanced preservation of contrasting viewpoints -- would render meaningless any later remedy." (A52)²¹

²¹ Similar claims are made in almost every stay application where possible "irreparable injury" is alleged as a matter of course.

it modified this position to request, subsequent to the actual format change, a monetary remedy so that it might purchase time and/or space in other media to present its side of the controversy to the then-dispersed WNCN audience. See, e.g., Guild pleading at A180, fn. 26.

Once WQIV began broadcasting rock, this was the only way the Guild could make its view known, and in fact, it purchased informational advertisements in the New York Times, the Village Voice, and FM Guide.²² All of this, of course, cost money. The Guild has argued that where the licensee's own actions make traditional fairness doctrine relief²³ impossible, the Commission²⁴ can and must fashion other remedies consistent with effectuation of the Fairness Doctrine.

If this Court finds that the Commission has erred in finding no fairness doctrine violation, it can determine that money damages would be appropriate or it can remand to the Commission for a determination on this matter. In any event, the violations in this case are not and should not be "rights" without remedies simply because of the Commission's erroneous and lengthy deference to the licensee.

²² The Guild also distributed handbills and flyers at major concert halls, where WNCN listeners persumably might be found, and sent mailings to persons calling in or otherwise requesting information.

²³ I.e., the broadcasting of conflicting viewpoints to the same audience which heard the licensee's originally broadcast viewpoint.

²⁴ The Commission has statutory authority to fashion all necessary remedies in support of its powers and duties. 47 U.S.C. §154(i), §303(r).

To find that there is or can be no "meaningful relief" in this case is to say that a licensee may avoid all consequences of fairness doctrine violations by his own illegal acts. We cannot believe that either the Fairness Doctrine or this Court will permit such a result.

Second, the five-party agreement referred to in the Commission's brief was in fact signed in August, but must be approved by the Commission before the transfer of WNCN can take place. If it is not approved in full, any of the petitioners may refuse to withdraw, thus terminating the agreement and most probably throwing the entire case into lengthy hearings. The Commission has not yet acted on this agreement, and is not expected to do so prior to the con-
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clusion of this appeal.

The five-party agreement, welcome as it may be to WNCN's listeners, in no way impairs the ability of this Court (or the Commission) to grant meaningful relief, nor does it obviate the necessity for such relief.

POINT IV

STARR'S LATER "COVERAGE" OF THE GUILD'S POSITION IS IRRELEVANT TO THIS APPEAL

Shortly before the changeover from classical WNCN

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In any event, recurrence of the same situation is clearly possible since WNCN has returned to its familiar unique classical format, and the present owner is still the Intervenor, Starr Broadcasting.

to rock WQIV, Starr, presumably on advice from counsel, aired brief news stories on the Guild's legal challenge. On the final day of WNCN's operation, Starr also aired a tape by Richard Clurman, Chairman of Buckley's WNCN Advisory Committee, discussing the "progress" of attempts to find a new home for WNCN.

Counsel for the Guild telephoned Starr with a new fairness doctrine request,²⁶ and was ultimately permitted to make a tape directly responding to Mr. Clurman's²⁷ which was aired several times, although with far less frequency than the²⁸ Clurman tape.

²⁶This occurred in November; the staff had, of course, already decided the initial fairness complaint which is the subject of this appeal in October.

²⁷The tape is illustrative of the consistency of the Guild's position about the real controversy. It states, in pertinent part:

"Today you have heard from Mr. Richard Clurman about his committee's efforts to save the WNCN format by transferring it to another frequency. These efforts have unfortunately, been unsuccessful.

"The WNCN Listeners Guild believes there is another way to save the classical format. That way is a lawsuit at the Federal Communications Commission and, if necessary, in the courts. The lawsuit would compel Starr Broadcasting Group, owners of WNCN, to continue the classical format as they stated they would in their application to the Federal Communications Commission when they bought the station in 1973."
A258 (emphasis added)

²⁸In fact, Mr. Buckley personally ordered the Glen tape cancelled during the late hours of the last night of WNCN's operation. It was played two more times the following morning. See Glen affidavit, A211, et seq.

Although this material was before the Commission it is nowhere reflected in the Commission's decision. This is not a surprising result since the later material was obviously not included in the staff decision which the Commission was actually reviewing.

While the Guild has argued that the "news coverage" and Glen tape were far too little and much too late,²⁹ that is not the issue here.

The Commission's brief attempts to interject this material (Comm'n Br. pp. 5, 20) but it constitutes no more than the post hoc rationalizations of counsel.³⁰ The material did not figure in the Commission's decision³¹ and it should not be considered in review of that decision here.

CONCLUSION

For all the reasons stated above, and for all the

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See Guild Opposition to Motion for Extension of Time re Fairness Complaint for a full discussion of this material, and affidavits reflecting the true factual situation. A170, et seq., and particularly pp. 176-181.

³⁰As such it cannot constitute a basis for affirmance. See, e.g., CBS v. FCC, 454 F.2d 1018, (D. C. Cir. 1972).

³¹Which was, after all, directed to the Buckley, et al. editorials broadcast in September of 1974.

reasons stated in the Guild's Brief on Appeal in this case,
the decision below should be reversed.

Respectfully submitted,

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ADDENDUM TO REPLY BRIEF

The Music Fades

One of the pleasures of living in the New York Metropolitan area has been the ready access to a variety of classical music on the radio. In much of the country, there is virtually no alternative to the endless barrage of country, rock and Western music that rules the air.

Unhappily, the threatened end to the broadcasting of classical music on FM station WNCN, which owns one of the world's great record libraries, would leave musical broadcasting in New York seriously diminished. Only one station—WQXR—would remain devoted chiefly to classical music, with a few others broadcasting fluctuating amounts.

Although there is a substantial musically literate and active population in New York, it seems that the economics of broadcasting dictate that programs must increasingly cater to mass audiences in order to survive. If this trend is to be resisted, classical music lovers must be prepared to rally directly to the support of first-rate broadcast music—not only for their own enjoyment but to attract young and developing audiences.

When Carnegie Hall was in danger of being torn down, a group of public-spirited citizens banded together to save the old hall, which today continues to enrich the city's musical life. Now an appeal is being made by WNCN's staff for pledges of funds to establish a non-commercial classical music station. A strong response directly addressed to the embattled station may yet keep alive a source of civilized pleasure for many New Yorkers in search of fine classical music.

RADIO ROUNDUP

By VAL ADAMS

PROTESTS ARE MOUNTING against the plan of WNCN to drop its format of classical music and switch to rock early in October under the new call letters of WQIV. One staunch fan of the station called The News and said he had gone to the WNCN office at 2 W. 45th St. and asked to see a copy of the license renewal application filed with the Federal Communications Commission in 1972. The application, which any station must make public upon request, said WNCN would devote at least 70% of its programming to classical music. The staunch fan wondered if WNCN really had the right to switch formats. The answer is yes. The only requirement is that a station notify the FCC of the change.

A woman on E. 93d St. wrote The News and labeled the WNCN development an "intolerable situation." She said she was starting a group called the Committee to Save WNCN. Another WNCN fan, a woman who is a nurse, phoned The News to say that elderly hospital patients listen to WNCN, particularly late at night. They are not interested in rock, she said. The nurse, too, wondered what could be done to stop the format change. In a way, it's like fighting City Hall, an endeavor that may score but whose track record is not outstanding.

A commercial radio station is licensed by the FCC to operate in the public interest, but the rock bottom truth is that a station owner operates for private gain. WNCN is losing money with a classical music format, it says, and believes it could do better with progressive rock. Understandably, WNCN's loyal fans feel that they are suddenly disowned. They care no more for rock than does the New York Philharmonic.

Last week, the protests began to worry William F. Buckley Jr., chairman of the Starr Broadcasting Group, owner of WNCN and 14 other radio and TV stations. Buckley went on WNCN and proposed a "Save WNCN" campaign in which the station call letters and music library would be donated to a noncommercial channel. Buckley's sincerity cannot be questioned, but some thought it also was an interesting way for him to try to get all those protesters off his back.



Walter Spencer
Looking for security

RADIO ROUNDUP

By VAL ADAMS

WHITHER WNCN? Will it be saved or will it wither? The way things stand now, it will be the latter, and there is little or no chance that things will change. William F. Buckley Jr., chairman of the Starr Broadcasting Group, owner of WNCN, is still talking optimistically. He appointed a committee of prominent citizens to decide which existing noncommercial station will be awarded WNCN's library of classical music with the promise to carry on in the WNCN tradition. Buckley's optimistic implication that WNCN will survive may be hard pressed to overcome present reality.

Three weeks ago Buckley confirmed a recurring rumor, first circulated last April, that WNCN (104.3 on the FM dial) planned to drop classical music, switch to progressive rock and change its call letters to WQIV. The rumor had been denied on several occasions by Starr Broadcasting officials at headquarters in New Orleans.

Ten days ago Buckley and Peter Starr, president of Starr Broadcasting, who came here from New Orleans, met with representatives of WBAI, WFUV and WNYC-FM. They proposed to give either of the stations the WNCN music library, which they valued at \$750,000, provided the recipient guaranteed 24 hours of classical music, gave a two-year contract at present salary to WNCN program hosts and changed its call letters to WNCN. Buckley and Starr also offered \$400,000 in pledges from listeners, which Buckley had sought in pleas broadcast by WNCN, and \$100,000 in cash.

Last week WBAI, WFUV and WNYC-FM said they had an interest in the WNCN music library, but they could not change their call letters to WNCN or accept other conditions in the proposal.

Larry Josephson, general manager of WBAI, said he was willing to expand the amount of classical music now broadcast by his station, but could not use the WNCN program hosts. Lawrence Marotta, program director of WFUV, owned by Fordham University, said his station would agree to play classical music from 1:05 a.m. to 8 or 9 a.m. each day and use WNCN personalities, provided Starr Broadcasting paid their salaries. Arnold Labaton, director of the Municipal Broadcasting System, said WNYC-FM now presents classical music 14 hours a day.

WNCN, which claims it is losing money with classical music, will switch to rock and change its call letters to WQIV Oct. 5. The change has brought protests from many listeners, whose number totals 419,000 in the course of a week, according to the American Research Bureau. One listener, Cyril Penn, an executive of the Ross Roy advertising agency, is so angry that he is getting up a petition to oppose Starr Broadcasting's license renewal that comes before the Federal Communications Commission next June.



Hal Peary
As Gildersleeve in 1945

Culture Shock

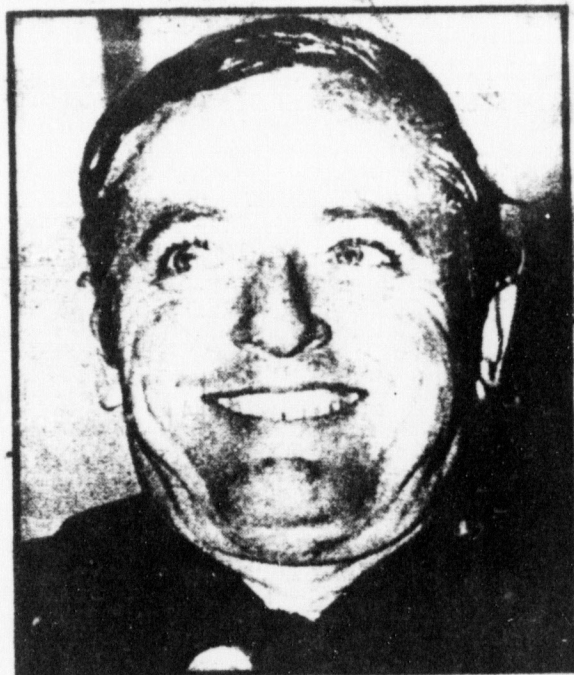
The Bach Stops Here

by Annette Kuhn

"YOU ARE SPEAKING to the ex-program director," said David Dubal. "I've just been fired." I had called WNCN, the only 24-hour classical music station in New York. After October 5, the programming will change to pop, and the estimated 400,000 listeners of the classical format will have to start roaming the dial to find something else. It is all rather unbelievable. I have not changed the setting of my radio for the last four years. WNCN was my audio haven. I bragged about it to out-of-towners. I cooked by it, woke up to it, learned from it. All of this will be no more.

William F. Buckley, Jr., chairman of the board of the Starr Broadcasting Group, made the announcement of the change, but not to the staff—who found out about it from the newspapers. This lack of communication with the ranks makes questionable the sincerity of Buckley's disclaimer that he for one would never listen to the station once it started its new format, and that the decision to go popular was regrettable but pragmatic. That is sheer cant. If the man had cared, he would have hired the best time salesmen, and not, as one ex-staffer put it, "people who resented the product they sold." The ex-staffer maintains—as he says, with hindsight—that the business side of the station management never understood who the audience for classical music was, and thus did not go after the big prestigious accounts, which would have put the station in a better position financially.

According to a taped message running on WNCN these last days of the old music, Buckley is asking that people interested in the possibilities of starting a non-commercial, all-classical station write in and say how much money they would pledge per year for running such a station. I not sure how much this move is meant as a pacifier for peoples' fury. I suspect that in a few months' time, a report will issue forth stating that there was not



May you flinch with guilt every time you suavely mention Bach or Beethoven if you don't write in and make your pledge this month. Or think—you can let Buckley know that his musical constituency is larger and more energetic than his political one.

enough interest to pursue this idea. Well, the way to beat that is for every one, and it really must be every one of the 400,000 listeners, to write in and make the pledge. There ought to be a massive benefit effort. The city's music makers and music halls ought to do their bit to raise funds. The Buckleys ought to have fund-raising cocktail parties (though I won't go as far as to suggest what they should serve). Eight million people deserve better than to lose another amenity and, to some, necessity of life, because the dollar failed to pour in at a profitable rate. Write to: Save WNCN, 2 West 45th Street, New York City.

Culture Shock

by Annette Kuhn

MY ITEM ABOUT WNCN two weeks ago left me rather the weaker for wear. Mostly, I got to learn that I was the dupe of that capitalist, conservative pig, William F. Buckley, chairman of the corporation that owns the radio station. Gee, I thought it was rather far-sighted of me to assume that all the ballyhoo about listeners' pledges would amount to naught unless it really became an outpouring of all the 400,000 souls who tend to listen to WNCN. Well, so far, a measly 20,000 callers have pledged some \$500,000 toward the salvation of WNCN's classical music format at another station. If the transfer of the format were to happen, it would mean a loss for New Yorkers in the sense that any station committing itself, in all likelihood, has already been broadcasting classical music. So no matter how it's looked at, it's the loss of a classical music station.

Cultural leaders like Schuyler Chapin, Richard Clurman, Frank Stanton, and Ted Sorensen have lent their services to a committee formed by Buckley to effect the transfer of the format to a willing station. Wily Leonard Bernstein declined to be on the committee. He could not be reached for his reasons, but hopefully they have something to do with the fact that this all is really no solution.

The solution seems to lie in litigation. The WNCN Listeners Guild has been set up to petition the FCC for a stay, and ultimate prohibition of the WNCN format change. There are precedents for such action, and even precedents for a good outcome of such a petition. The emotions surrounding the whole WNCN question make it hard to decide where the best avenue of attack lies. But it seems clear that William F. Buckley is going to have a rough time of it in this town for a long while. As a friend said: How can you trust a man who gets a \$100,000 grant for the format transfer of WNCN from a foundation called "Merlin." The Foundation Center has no records of this magical funding group, but has been getting lots of calls about it lately. If your instincts are toward litigation, the address to write to is: WNCN Listeners Guild, 663 Fifth Avenue, New York City. And pray that the FCC arises phoenix-like from its conservative slumber to smite the philistine intrusion into our airwaves.



Critic-at-Large

How to really 'save' WNCN

By BYRON BELT

The public is being taken for a ride — and one that will probably end with no 24-hour good music station in the metropolitan area unless it takes the proper steps — and takes them today.

WNCN, New York's only full-time classical music station, has been designated by its owners, the Starr Broadcasting group, to become a popular (make that "rock") music station on Saturday, Oct. 5.

A "Save WNCN" campaign has been launched by Starr board chairman William F. Buckley Jr. that is a masterpiece of side-stepping the issues. By urging contributions to provide a 24-hour-a-day classical music format free of commercial announcements, the public has been led away from using its time and energies on the only front where the battle can be won: With the FCC in Washington.

THE "SAVE WNCN" people have good intentions on their side, but they have only possibilities to offer. They are "actively seeking" channels where the music now available on 103.4 FM "may" be heard if negotiations should — possibly — work out. Readers must understand that chances are extremely remote that such a solution may be found; and readers should understand that, if valuable time had not been lost with the side-tracking campaign for "tax-deductible" funds, WNCN's good music might already be assured, and where it belongs as a legal public right: at 104.3 F.M.

There is no need for funds, as heartening as the raising of some \$500,000 in "pledges" from some 20,000 listeners (out of a reported audience of 400,000) for the law requires WNCN to retain its classical music format under its PRESENT management on 104.3 on the FM dial.

When making its deal to purchase the station a couple of years ago, Starr Broadcasting GUARANTEED in writing to retain a minimum of 70 per cent classical music

as an absolute condition of being granted its license by the FCC.

It is now the FCC's duty, responsibility, obligation — and only the FCC's — to demand that WNCN live up to its obligation and retain the present format for a station that is desperately needed by listeners to whom the airways belong, for their "convenience and necessity."

THE ENTHUSIASTIC dedication of volunteers and pledgers is not to be sneered at, but it is sad that, by buying the goal of a listener-sponsored station, they are bailing out a business group that owes them the obligation to maintain the very thing generous listeners are trying to "save" elsewhere.

The answer is simply this: if pledging money or volunteering eases one's sense of duty, then, by all means pledge and volunteer. But do not be fooled: Contributions will then be needed forever if such a new station were to survive, and you are NOT helping "Save WNCN," you are merely granting a lucrative "pardon" to those who owe us the good music right where it is: 104.3 FM.

If you really wish to save WNCN (and good broadcasting elsewhere) there is only ONE way: Write Mr. William Ray, Broadcast Bureau, FCC, Washington, D.C. 20554 and demand public hearings before any change is made on the current WNCN broadcasting format. If you do not wish to write, tear out this article and mail it instead. But do it today — or Oct. 5 will arrive with promises and pledges — and no good music 24 hours a day anywhere!

The Lively Arts/Alan Rich

MR. BUCKLEY PASSES THE BUCK

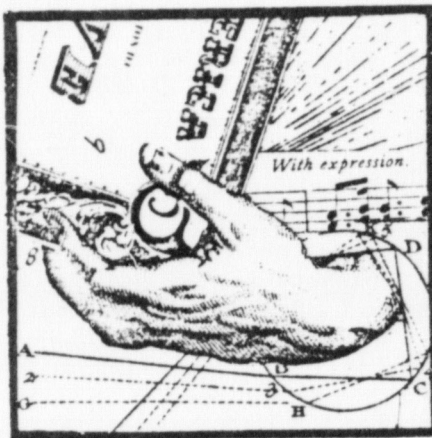
"...The arrogance behind WNCN's current charade is appalling; nobody who recognizes the station's value should be taken in ..."

Just in from Paris, where there is an official Académie to make sure that the words in the French language are used to mean what they are supposed to mean, I picked up a *Times* and began wading through the doubletalk surrounding the situation at WNCN. This FM station, in case you too have been away, is about to change its program policy from 24-hours-a-day classical music to something more profitable (or so, at least, the management hopes): wall-to-wall commercials interspersed with rock 'n' roll.

Actually, the doubletalk has been going on for months, only now it has redoubled several times. The news about the switch broke in this magazine's "Intelligencer" early this summer, and was greeted with loud outcries by the station's faithful listeners (who are many) and equally loud denials from management. Now, anyone who has been reading newspapers for the past few years should know about denials by this time, and WNCN's response did, indeed, follow the well-trodden path. Actually, it now turns out that WNCN's owners, the Starr Broadcasting Group, of which William F. Buckley Jr. is chairman of the board, had charted its course when it took over the station a year ago. "We'll keep the classical policy for a year," the station manager at that time told a few insiders "off the record," "and then we'll plead poverty and make the change."

Thus, the WNCN changeover had been on the boards months before *New York* broke the story—on the boards, and actually implemented. The station's breaks used to identify it as "WNCN, the Cleveland Orchestra station" yet it had quietly walked out of the Cleveland contract last spring. That distinguished series, and another former WNCN series of excellent musical commentary by Karl Haas, were acquired this summer by WOXR. Thus, even if the various campaigns to "save" WNCN should succeed, those two important program series are already beyond "salvation." The station's record librarian was let go several months ago; new records at the station lie unpacked and uncataloged.

None of this should surprise anyone



acquainted with Starr Broadcasting. It is, and has been for years (*New York*, June 14, 1971), the operator of a string of lucrative rock stations around the country. Thus, whether or not Mr. Buckley likes that kind of music (he has heartbrokenly announced that he, personally, will not listen to the "new" WNCN), he is a practiced hand at weeping all the way to the bank.

WNCN's first public announcements in the past few weeks were not doubletalk in and of themselves; they were fairly standard public-announcement lingo, vintage 1974. But now, in an attempt to cover itself and its cultural conscience (or is that an odd phrase to be using in this context?), Starr has publicly announced the offer of its record library (which I've seen and which is not notably vast) and \$100,000 (a couple of months' operating budget for even the most modest radio operation) to any noncommercial station that will assume its current staff and format. Possible recipients are the city station WNYC, the listener-supported station WBAI, and the Fordham station WFUV. An approach has also been made to the State University station at Stony Brook. Such an offer, of course, is pure smoke-screen. The two college stations have small transmitters, and it would take a lot more than \$100,000 to upgrade them to equal WNCN's coverage (even if the colleges and the F.C.C. were willing, which is doubtful). WNYC serves the city in too many ways right now to drop everything and become all-music; it broadcasts a great deal of

music as it is, with a record library older and more diversified than the WNCN collection. WBAI is politically and culturally unique, and many of its commentators must, I'm sure, give William Buckley a bad night or two. The station would be insane to drop this kind of programming for a few pieces of silver, however badly broke it may be.

The arrogance in this whole public-relations move is appalling and I cannot imagine that anyone with the intelligence to understand WNCN's present value could be taken in by any of it. It is saddening, of course, to see yet another distinguished cultural institution (which can be a radio station as easily as a symphony orchestra) foundering and finally collapsing for lack of funds. Nobody doubts that it's a lot harder to sell advertising on a classical-music station than on a rock or musical wallpaper operation, and the least we can assume is that WNCN's poverty plea is real. But why must this tawdry insult to the intelligence be added to the real tragedy?

It goes on. In a further charade, the station has now announced that large numbers of people have "pledged" their support for the continuance of WNCN's present format. Starr Broadcasting knows exactly what it's doing here. It knows from precedent that should the WNCN license be challenged by an outside group, and the F.C.C. made to rule on the propriety of the format change, no number of "pledges" will carry any weight whatsoever. This has been proved in a number of other cities, where similar moves have taken place and citizen challenges have been mounted. Small wonder, then, that the "Save WNCN" campaign is being directed from within the station, by a Starr employee.

At this writing some half-million dollars has been pledged, which represents a public-relations triumph of sorts. But the gesture is futile, first of all because it represents a response by individuals which does not constitute a force that the F.C.C. will recognize if a challenge is mounted, and also because it adds up to a fund that any station could run through for normal operation in less than a year—to be followed

by merely another crisis like the present one. What any classical-music station needs for survival is more than mere money: it is a staff that believes in what it is doing and knows how to promote itself. WNCN's present failure stems to a great extent from its inadequate self-selling job over the years past.

There is, however, a way that the changeover *can* be challenged. A list of "pledges" is worthless, and WNCN's current campaign to amass one is a purely diversionary tactic. But an organization of concerned citizens, who have paid something (even a dollar) in dues has genuine weight. Two years ago a station in Syracuse, WONO, announced that it was dropping its classical-music programming, and an outside protesting group was organized. The F.C.C. initially refused to hear that group, but that decision was overturned in court; a hearing was held, and today WONO still programs serious music. A similar case was mounted and won at WFMT in Chicago; that is even more interesting in the WNCN situation, because Chicago did have other stations offering classical music, too—as New York does—but that fact was not allowed to influence the F.C.C.'s decision. Anyhow, that kind of independent organization, known as the "WNCN Listener's Guild" has now been formed, headed by Kate Steichen (Edward's daughter). You can reach the Guild at 663 Fifth Avenue, New York 10022. No phone; they need the money for more important things, like lawyers.

WNCN's disappearance from the cultural map would not, of course, mean the end of classical music on the air in New York, but it would be a tragedy nevertheless—of itself and for the precedents it could set. Actually, WNCN has been a weird, but lovable, operation. Not long ago its nighttime announcer, Bill Watson, hooked a lot of people—mostly young insomniacs—with his pseudo-hip blather and programming that might include, in one swell foop, two or three performances of the *St. Matthew Passion* back-to-back. But Watson was a culture-hero of genuine stature, and turned some of his personal hobby-horses (the flutist Jean-Pierre Rampal, for one) into culture-heroes as well. Somebody named Fleetwood carried on (a term judiciously chosen) in Watson's wake, again with a fine technique for getting himself and his music under the skin. Contrasted with WNCN's personal, inventive musical policy, WQXR is slick and middle-class, WNYC bumbling, WBAI overbalanced toward esoterica. If WNCN isn't worth fighting for, very little in our culture is. ■



United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-4145

WNCN LISTENER'S GUILD

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA

RESPONDENTS

STARR WQIV, INC.

Intervenor

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street Flushing, N.Y.

That on the 16th day of March, 1976, deponent served the within Petitioner's Reply Brief

Ashton B. Hardy, General Counsel, Federal Communications Commission upon 1919 M Street, N.W.; Washington, D.C. 20554

Thomas E. Kauper, Assist. Attorney General Department of Justice, Washington, D.C. 20530

Howard Braun, Fly, Sheubruk, Blume & Gaguine 1211 Connecticut Ave, N.W.; Washington, D.C. 20036

Respondents

Attorney(s) for the in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Stephen Zedalis

Sworn to before me,

This 16th day of March 1976

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976